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IN THE

Supreme Court of the United States

October Term, 1964

No. 785

ERNEST LEON DOWNS, *et al.*,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KANSAS CITY, KANSAS, a Corporation, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Tenth Circuit entered in this cause on September 25, 1964.

Opinion Below

The opinion of the Court of Appeals is reported at 366 F. 2d 988 (10th Cir. 1964) and is appended hereto *infra* at page 1a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). Judgment of the Court of Appeals was entered on September 25, 1964.

Questions Presented

I. Are Fourteenth Amendment requirements met where a school board, which prior to 1954 administered a compulsory segregated public school system pursuant to law, justifies the continuation of this bi-racial system with retention of substantially the same attendance zones, on the theory that desegregation has been effectuated by the abandonment of school assignments specifically based upon race alone?

II. Is the decision below, which approves of the continuation of the same number of Negro schools which existed before *Brown*, ignores discriminatory feeder patterns, teacher and staff segregation and zone line manipulations and conflicts with decisions of this Court and those of the other circuits, consistent with the mandate of the Fourteenth Amendment?

III. Where a school board has engaged in policies and activities which have increased and entrenched racial segregation in a school system, do not these acts, rather than the board's pronouncements, determine the question of intent and good faith?

Statement of the Case

The public school system of Kansas City, Kansas consists of elementary, junior high, senior high schools and a junior college (R. 37). Prior to 1951, the entire system was administered on a segregated basis, and the faculties of each school reflected the racial composition of the student body (R. 39; 46). In 1951, the two separate segregated junior colleges were merged, but only the white faculty members were retained to teach on the junior college level (R. 43-44). Segregation in the junior college was neither authorized nor required by law.

In 1954, subsequent to the decision of this Court in *Brown* v. *Board of Education*, 347 U. S. 483, the Kansas

City School Board announced a policy whereby the remaining public schools were to be desegregated. The board empowered the superintendent of schools to implement this policy (R. 22-23). Prior to 1954, Douglass, Dunbar, Kealing, Stowe, Attucks, Lincoln and Grant elementary schools were maintained for Negro pupils, and the attendance areas for these schools were based upon Negro residential patterns (R. 39; 46; 116). Northeast Junior High and Sumner High Schools were maintained for Negro students on a city-wide basis; the Negro schools were staffed by Negro personnel and the white schools by white personnel (R. 39; 45-46). At the time of the hearing below, Douglass, Dunbar, Kealing, Stowe, Attucks and Grant elementary schools were still all or predominantly Negro schools, together with Hawthorne which had been a white school; Lincoln had been discontinued (R. 31-32; 39; 46; 49). Attendance areas were basically along racial residential lines (R. 46; 116-117). Only Negro personnel staff these Negro schools, and Negro teachers are unable to teach in white schools (R. 39; 125). Pursuant to feeder patterns, students from all of the above elementary schools, except Attucks and part of Hawthorne, may attend only Northeast Junior High School which in turn feeds exclusively into Sumner High School (R. 50; 58; 117). These elementary schools and both Northeast and Sumner are virtually 100% Negro and are considered as Negro schools by school officials and the community (R. 31; 39; 49). Prior to 1954, Attucks elementary school attendance area was coextensive with that of the white Rosedale elementary school; a new attendance area has been delineated for Attucks which encompasses all children within walking distance of the school (R. 116). The attendance areas for the remaining Negro schools were not changed (R. 117).

The Kansas City School District extends beyond the city limits and three schools outside the city limits enroll a total of 51 Negro students. Of the 5,524 children enrolled at Attucks (188), Hawthorne (702), Dunbar (816), Douglass (888), Kealing (364), Grant (365), Stowe (327),

Northeast (1077), and Sumner (797), only 11 are white (R. 98-99; 125-126; 169-170). Although the board's Exhibit B reflects that 2,241 Negro children are enrolled in schools other than the Negro schools listed above, the 1960 census report shows that there are only 6,324 Negro children within the city limits of Kansas City between the ages of 5 and 18 (R. 100). The board's figures would bring the total of Negro children of public school age within the city limits to 7,703.

Prior to September, 1960, Hawthorne, an elementary school, which was attended by white students and staffed by white personnel, fed into the predominantly white Northwest Junior High School whose students, in turn, were assigned to the predominantly white Wyandotte High School (R. 50; 73). The racial composition of Northwest and Wyandotte is substantially consistent with their pre-1954 character (R. 31). At that time, the attendance area of Hawthorne encompassed a white neighborhood and its attendance area extended westward from 9th Street (R. 103; 136). Negro families had not been able to purchase homes in the Hawthorne School district since white real estate brokers would not sell property to Negroes in white residential areas (R. 129-131; 135; 139-141). In 1958, a Negro lending institution processed a number of mortgage loans enabling Negro families to move into the Hawthorne district which had been subject to urban renewal (R. 139-141). As a result, many Negroes occupied homes between 9th and 13th Streets. As of September, 1960, only four Negro families lived west of 13th Street (R. 138).

At that time, the school board changed the feeder pattern from the Hawthorne school so that students living east of 13th Street who would ordinarily attend the Northwest and Wyandotte schools were required to attend Northeast and finally Sumner (R. 54). The change which affected the majority of Negro students attending Hawthorne was not publicized; in fact, great difficulty was en-

countered by the parents of children affected in ascertaining the basis for the alteration in the enrollment pattern (R. 120).

Just prior to the close of the 1959-1960 school year, the principal of the Northeast Junior High School preenrolled the sixth grade class of the Hawthorne School, consisting of approximately 70-80 white and Negro students (R. 68-69). Parents, petitioners in this action, who had children at the Northwest Junior High School, upon learning that their younger children would attend Northeast met with the assistant superintendent, and later with members of the board of education (R. 75-77; 82; 84; 85; 88; 90). The school board claimed to have no information regarding the change in attendance requirements and advised the parents that upon the return of the superintendent to the city, some definite information would be provided (R. 85; 90). In the course of an August meeting of these parents with the superintendent, the board stated that attendance lines for the Northeast and Northwest junior high schools had not been changed (R. 78; 81; 85; 90). In September, after being refused the right to enroll their children in the Northwest Junior High School, these parents were advised, for the first time, that the zone line between the junior high schools had been altered and that Hawthorne graduates living east of 13th Street were now in the Northeast Junior High district (R. 79; 85; 91; 92). The principal of Northwest stated that all children residing east of 13th Street were required to attend Northeast (R. 105). Attendance at Northwest was to be granted only if a permit to transfer was secured from the superintendent (R. 86; 91). At the commencement of the 1961 school year, the petitioners again unsuccessfully sought to enroll their children in Northwest (R. 79, 88, 92).

The board then adopted a policy—presumably previously in effect, but recorded for the first time in September, 1960—whereby a child was allowed to transfer out of a

school in which his race did not predominate; this policy was to be implemented when the Negro enrollment reached a certain percentage (R. 40; 51; 52; 78; 28-29). As a result, white students in the Hawthorne district were permitted to attend schools other than Hawthorne, Northeast or Sumner (R. 51). Additionally, the white faculty of Hawthorne was replaced by Negroes pursuant to the board's policy of staffing Negro schools with Negro personnel (R. 50). Transfer permits are arranged through the principal of the school sought to be attended and require approval of the superintendent. Theoretically, a permit is secured on request of, or after contact with, a parent but, in the instance of children residing out of the Northwest district but attending the Northwest School, this procedure was not followed (R. 51; 85).

Witnesses at the trial in the district court, which commenced on January 29, 1962, testified that Negro children living closer to Northwest had been compelled to attend Northeast, while white children who lived closer to Northeast had been enrolled at Northwest (R. 82; 83; 93; 94).

Respondents testified that the change of the boundary line between the Northwest and Northeast junior high schools was made to equalize pupil enrollment, but petitioners' Exhibits 29 and 31 (R. 62; 63), which reflect class schedules for Northwest for the 1959-1960 and the 1960-1961 school years, show no appreciable change in class size, nor any class in excess of the optimum for effective teaching as set by the superintendent of schools (R. 55; 108; 60-63). Respondents stated that although they regarded Northeast as a Negro school, the change in the boundary line was made without knowledge of the number of white and Negro students to be affected (R. 109). However, the superintendent testified that he recognized that the majority of Negro families in the district lived east of 13th Street (R. 120).

The district court found on July 9, 1963 that the change in the attendance boundary lines of the Northwest and

Northeast school districts was made to avoid overcrowding one school at a time when space was available at another, and not in "bad faith" (R. 20). While declaring that the transfer provisions based on race were invalid in view of *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683, the court found that their use had not indicated any intent to maintain and perpetuate segregated schools (R. 22). It was further held that the "overall policy" of the board of education met the test of *Brown* v. *Board of Education*, 349 U. S. 294, and that the desegregation there required had been effectuated.

Appeal was taken to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment of the trial court and held that neither the change in zone lines, the pupil transfer policies, nor the segregated faculties were sufficient, alone or in combination, to establish discriminatory intent (pp. 14a-16a, *infra*).

In the belief that the decisions below are contrary to the decisions of this Court and in conflict with the holdings of other circuits interpreting the reach, scope and meaning of *Brown*, petitioners seek review by this Court.

Reasons for Allowance of the Writ

1. The decision of the court below is in conflict with *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; and *Goss* v. *Board of Education*, 373 U. S. 683. These decisions forbid state-enforced segregation in public schools brought about by any official means. The second *Brown* decision, 349 U. S. 294, also places on boards of education in districts where segregation by law has existed, the obligation to develop and implement plans for the complete desegregation of their school systems.

Prior to *Brown*, the Board of Education of Kansas City, Kansas, maintained, in accordance with state law, a biracial school system which contained 9 Negro schools. Today, the board of education continues to operate 9 schools which are virtually all Negro-attended.[1] Yet the board states that it has completed the process of desegregation (R. 48), and the court below has judicially approved this statement in spite of the fact that the characteristic indicia of a segregated system—zoning in accordance with Negro residential patterns, Negro elementary schools feeding into Negro secondary schools, segregated faculty and supporting personnel, and manipulations of zone lines—are glaringly evident.

Judicial approval of this flagrant failure to desegregate was based on a finding that, prior to 1954, boundary lines were established on the basis of race, and were thereafter established on the basis of geography.

According to the court below, this changed method of zoning, although its results, in respect to the racial composition in the schools in the district, were virtually the same as before, brought the board within the ambit of "good faith compliance" required by the second *Brown* decision, 349 U. S. at 300-301.

Approval of such an interpretation of *Brown*, when applied to the instant case, would only serve to render sterile the doctrine of the original *School Segregation* decisions. For the geographical zoning which the board and the court below speak of was, of necessity, from its very inception, racial zoning. Prior to 1954, it can be determined from the testimony of the superintendent of

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[1] Seven elementary schools are all or virtually all Negro-attended. These seven schools—Grant, Kealing, Stowe, Dunbar, Douglass, Attucks and Hawthorne—are the sole sources from which one of the junior high schools in the system draws its pupils; the graduates of this junior high school—Northeast—in turn become the entire student body of the Sumner High School.

schools that Negro schools were placed in the most concentrated Negro residential areas,[2] and that Negro children who lived outside these areas "were hauled" into these schools (R. 116). Attendance areas for Grant, Kealing, Stowe, Dunbar and Douglass have not been changed from what they had been prior to 1954 (R. 116-117).[3] As to these schools then, the board has done nothing at all to desegregate. Instead, it has made a change on paper, designating geography rather than race as the determinative factor in school attendance, but these schools are maintained for Negro children and are regarded as Negro schools just as before.

Paper compliance is not enough to satisfy the standards of desegregation ordered by the second *Brown* decision. *Copper* v. *Aaron, supra,* and *Goss* v. *Board of Education, supra,* make this clear.

The decision below also conflicts with numerous school segregation decisions rendered in other circuits: *Taylor* v. *Board of Education of New Rochelle,* 191 F. Supp. 181, 192 (S. D. N. Y. 1961), 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd, 294 F. 2d 36 (2nd Cir. 1961), cert. denied, 368 U. S. 940; *Evans* v. *Ennis,* 281 F. 2d 385 (3rd Cir. 1960), cert. denied, 364 U. S. 933; *Brooks* v. *County School Board of Arlington, Va.,* 324 F. 2d 303, 308 (4th Cir. 1963); *Bradley* v. *School Board of City of Richmond, Va.,* 317 F. 2d 429 (4th Cir. 1963); *Jackson* v. *School Board of*

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[2] The superintendent testified that Negro elementary school attendance areas were based on Negro residential patterns, with the exception that some Negro children "were hauled" into concentrated Negro areas from other areas (R. 116-117). Plaintiffs conclude from this testimony that the schools were built in these areas specifically for Negro children.

[3] The superintendent was asked:

Q. What about the schools in the Northeast area, were those zones changed?

A. No, where they were all Negro, they would probably remain the same.

Lynchburg, Va., 321 F. 2d 230 (4th Cir. 1963); *Holland* v. *Board of Public Instruction*, 258 F. 2d 730 (5th Cir. 1958); *Bush* v. *New Orleans Parish School Board*, 308 F. 2d 491, 492 (5th Cir. 1962); *Ross* v. *Dyer*, 312 F. 2d 191 (5th Cir. 1963); *Board of Public Instruction of Duval County, Florida* v. *Braxton*, 326 F. 2d 616 (5th Cir. 1964), cert. denied, 377 U. S. 924; *Dove* v. *Parham*, 282 F. 2d 256 (8th Cir. 1960).

While relying on language in *Northcross* v. *Board of Education of City of Memphis*, 302 F. 2d 818, 823 (6th Cir. 1962), cert. denied, 370 U. S. 944, for its conclusion that geographic zoning meets constitutional requirements, the court below has ignored and ruled contrary to the holding in *Holland* v. *Board of Public Instruction*, 258 F. 2d 730, 732 (5th Cir. 1958). There school attendance boundaries corresponded with the boundaries of Negro residential areas segregated by city ordinance. The court held that although attendance purported to relate to residence and not race, there was a violation of the Fourteenth Amendment in view of the obvious fact that the board of education was taking advantage of the patterns of housing segregation to achieve school segregation. Where, as in the instant case, residential segregation is achieved through private discrimination (R. 129-131; 135; 139-141), and the board, with knowledge of these segregated patterns, draws its zone lines to correspond to them, the rationale in *Holland* must apply.

The decision below is also in conflict with a line of cases in other circuits which have held that desegregation of teaching staffs and supporting personnel is necessary in order to guarantee the students' right to an education free from any consideration of race. See *Mapp* v. *Board of Education of the City of Chattanoga, Tenn.*, 319 F. 2d 571, 576 (6th Cir. 1963); *Board of Public Instruction of Duval County* v. *Braxton*, 326 F. 2d 616 (5th Cir. 1964), cert. denied, 377 U. S. 924.

Here the court of appeals would ignore the fact that the faculty of Negro schools is entirely Negro and the faculty of the white or of the few integrated schools is entirely white, pursuant to a policy of staffing Negro schools with Negro teachers and administrative personnel only, and of staffing white schools with white personnel (R. 39, 125). The rigidity of this policy was emphasized with the changing of Hawthorne's staff from all white to all Negro, after the board had decided it had become a Negro school.

The attempt of the court below (App. 14a-15a) to avoid the issue of teacher and staff segregation on the ground that appellants' complaint did not specifically raise these issues only serves to create another conflict between jurisdictions. The fourth circuit has specifically held that a school segregation complaint brings into issue all aspects of a school board's operations. See *Jackson* v. *School Board of Lynchburg, Va.*, 321 F. 2d 230, 233 (4th Cir. 1963).

Nor is the decision below in harmony with *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181, 192 (S. D. N. Y. 1961), 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd 294 F. 2d 36 (2d Cir. 1961), cert. denied, 368 U. S. 940. There the court, when faced with evidence of zoning which created racial segregation, ordered the board to desegregate. The district court held at 191 F. Supp. 192:

> . . . I see no basis to draw a distinction, legal or moral, between segregation established by the formality of a dual system of education, as in *Brown*, and that created by gerrymandering of school district lines and transferring of white children as in the instant case. Cf. *Gomillion* v. *Lightfoot* [364 U. S. 339]. The result is the same in each case: the conduct of responsible school officials has operated to deny the Negro children the opportunities for a full and meaningful educational experience guaranteed to them by the Fourteenth Amendment.

The court below, however, found no significance in the fact that through manipulation of the zone line determining admission to the white Northwest and Negro Northeast Junior High Schools, all Negro students in the Hawthorne elementary school district attend Northeast. On the other hand, white children in the district—sometimes neighbors of the Negro children assigned to the Negro junior high—attend Northwest (R. 94).

The federal courts have consistently treated such zoning configurations as evidencing non-compliance with the strictures of the Fourteenth Amendment. As explicated in *Evans* v. *Buchanan*, 207 F. Supp. 820, 825 (D. Del. 1962):

> When it is alleged and uncontroverted as in this case that the children go to an all Negro student and faculty school, administered by a separate Board of Trustees, and surrounded entirely by predominantly white attendance areas, the controlling public attendance area plan is subject to careful scrutiny . . . since a presumption of unconstitutionality arises under this set of facts.

Similarly, in *Brooks* v. *County School Board of Arlington, Va.*, 324 F. 2d 303, 308 (4th Cir. 1963), where a Negro school zone was an enclave surrounded by white school zones, the court found that ". . . the process of transition from segregation to desegregation is not yet finished." Yet, the board in the case at bar has made clear that it will take no further steps to desegregate the schools under its jurisdiction.

In the face of these rulings, the board here argues that although the school system contains eleven all-white schools and nine virtually all-Negro schools, desegregation has been effected because some Negro children now attend school with whites. The board's Exhibit B seeks to show that 2,241 Negroes are enrolled in schools in the district other than in the Negro elementary and secondary schools.

Only 51 of those listed are in schools (Eugene Ware, Noble Prentis and Thomas A. Edison) outside the city limits. This would show a total of 7,703 Negro children in schools within the city imits. These figures were received by the district court although petitioners showed that they are in conflict with census statistics. The 1960 census figures indicated that there were only 6,324 Negroes between the ages of 5-18 reported within the city limits of Kansas City. The number of Negro children enrolled in schools other than the Negro schools must thus be substantially smaller than the number claimed by the board.[4]

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[4] There are 5,524 pupils in Negro schools; subtracting the 11 white children leaves 5,513 Negroes. 2,241 Negro children in integrated schools, with 51 outside the city limits subtracted, would leave a total of 2,190 in integrated schools in Kansas City proper. The total number of Negro school children within the city limits would thus be 5,513 plus 2,190—totalling 7,703.

According to census figures, there are 19,977 white children between 5 and 18 within the city limits (R. 100). The total elementary and secondary school enrollment in the entire school district is 23,641 (R. 99). It should be remembered that the district extends beyond the city limits. Subtracting the 2,241 Negro children in integrated schools and the 5,513 Negro children in the 9 Negro schools from the total leaves 15,887 white children in the school system both within and without the city limits. And this would mean while Negro children between 5-18 in the city limits total only 6,324, and 51 Negro children are outside, a total of 7,703 Negro children or 1,379 Negro children in excess of those in 5-18 age limits in the city are attending school in Kansas City. On the other hand, although there are 19,000 plus white children in that age bracket in the city limits, only 15,887 white children are in school in the whole district. Thus, in Kansas City, according to the board's figures, there is an extraordinarily high incidence of Negro children remaining in school, and whites have an extraordinarily high incidence of dropouts. This is so at war with the normal patterns throughout the United States that the Court should take judicial notice of the fact that these figures are in error. Fay v. New York, 332 U. S. 261, 276; Edwards v. California, 314 U. S. 160, 173. The only logical conclusion to be drawn is that there are only a few hundred Negro children going to school in the city limits other than the 5,513 Negro children enrolled in the 9 Negro schools.

Moreover, the integration of some pupils does not discharge the duty under the Fourteenth Amendment to end all state-enforced racial segregation. In *Bradley* v. *School Board*, 317 F. 2d 429 (4th Cir. 1963), the board argued that there were Negroes attending white schools even outside their attendance area. The court of appeals held at pages 434-435 that this was not in itself "sufficient to evidence a reasonable start toward maintaining a nondiscriminatory school system and consistent with the true concept of equal constitutional protection of the races." See in accord *Brooks* v. *County School Board of Arlington, Va.*, 324 F. 2d 303, 308 (4th Cir. 1963), where it was held that although some Negroes were enrolled in white schools nearest their homes, ". . . the process of transition from segregation to desegregation is not yet finished."

Nor does the formulation of the board's policies in terms of educational theory or verbiage preclude the operation of Fourteenth Amendment proscriptions. In *Ross* v. *Dyer*, 312 F. 2d 191, 196 (5th Cir. 1963), the court found that a rule of long standing, even if applied in the same way to Negroes and whites and not overtly predicated on race, may still be a violation of the Fourteenth Amendment if "in the transition from a segregated to a desegregated school system," such a rule prevents Negro children from achieving constitutional rights.

The authoritative construction of *Brown* and cognate cases by the Court of Appeals for the Eighth Circuit in *Dove* v. *Parham, supra*, at pages 258-259, succinctly states the rule:

> Standards of placement cannot be devised or given application to preserve an existing system of imposed segregation. Nor can educational principles and theories justify such a result. These elements, like everything else, are subordinate to and may not prevent the vindication of constitutional rights.

* * *

> If placement standards, educational theories, or other criteria used have the effect in application of preserving a created status of constitutional violation, then they fail to constitute a sufficient remedy for dealing with the constitutional wrong.

In the instant case, the school system is not in transition; the process of desegregation has been terminated. Thus, the facts must be subject to even closer scrutiny and stricter analysis than in those cases where educational authorities are continuing to seek methods of eliminating discrimination. The school zone lines and staff assignment policies in Kansas City do not comply with the rule in *Brown*. The decision below sanctions this non-compliance and should be reviewed by this Court.

2. The court of appeals has permitted the board's professions of good faith to be substituted for judicial resolution of the question of whether the conduct of respondents has circumvented cherished constitutional guarantees.

The record in this case demonstrates that after the board's official announcement that it was eliminating racial discrimination in the school system, it initiated policies which extended and increased segregation. Yet the court below found that the board's policy of allowing students to transfer from schools where their race was in the minority "has no bearing upon the board's intent;" that assignment of school staffs on the basis of the race of the pupils did not establish discriminatory motivation; and that there was no evidence that boundary lines which were altered to follow racial residential patterns were changed to perpetuate discrimination (App. pp. 14a-15a, *infra*).

Petitioners submit that these determinations were erroneous and that the board's acts do not constitute the "good faith implementation of the governing constitutional principles" required by *Brown* v. *Board of Education*, 349 U. S. 294, 299.

This Court has, in affirming the viability of the Fourteenth and Fifteenth Amendments, consistently required that "good faith implementation" be considered in terms of the realities encompassed by the challenged act.

Since the passage of these amendments, this Court has been required to review a variety of subterfuges which have been employed by state officials to nullify their effects. The purpose of these subterfuges was to present the appearance of compliance without surrendering the unlawful prerogatives of segregation.

The "grandfather clause" preventing descendants of the disenfranchised from voting (*Guinn* v. *United States*, 238 U. S. 347); restriction of voters to those registered or voting in certain previous elections (*Lane* v. *Wilson*, 307 U. S. 268); the use of all-white primaries depriving Negroes of effective choice of candidates (*Smith* v. *Allwright*, 321 U. S. 649), illustrate a few of the devices used to prevent realization of the guarantees of the Fifteenth Amendment. All such attempts have been rejected on the grounds that the amendment did not merely intone an abstract right, but proscribed ". . . sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, *supra*, at page 275.

This Court has rejected with equal vigor efforts to dilute or negate the assurances of the Fourteenth Amendment. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (ordinance requiring consent of public body to operate laundry applied discriminatorily only against Chinese); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (Negro graduate student allowed to attend University but segregated from colleagues).

Utilization of any stratagem to deny the constitutional right of Negro children to be free of discriminatory administration in the public schools was interdicted in *Cooper* v. *Aaron*, *supra*, at page 17:

> In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'

See in accord *Griffin* v. *Board of Supervisors of Prince Edward County,* 377 U. S. 218; *Goss* v. *Board of Education of Knoxville, supra.*

The federal courts have applied the guarantees of equal protection and due process with realistic insight. The court of appeals in *Griffin* v. *Board of Supervisors,* — F. 2d — (4th Cir. decided December 2, 1964) dealt with a state's attempt to evade school integration while purporting to comply, as follows:

> If such strategic maneuvers, resorted to in response to the law's requirement, pass muster, Prince Edward and Surry have indeed accomplished a remarkable feat, stultifying a decade of judicial effort to bring about compliance with *Brown* v. *Board of Education.* But the label applied to these Foundation schools cannot blind courts, or anyone else, to the realities.

Nor can the label of "neighborhood school plan", obscure here a pattern of conduct which insures the maximization of segregation. This Court need not look far to ferret out the "strategic maneuvers" which the board used to make certain that racial housing patterns are reflected to the utmost in schools. Racial considerations permeate every aspect of the board's policies.

When the racial composition of the Hawthorne elementary school district shifted from white to predominantly Negro, the board in September, 1960, publicly adopted

a policy which had previously been covertly in effect, of permitting a child to transfer out of a school in which his race did not predominate (R. 28-29; 40; 51; 52; 78). As a result, white students in the Hawthorne district were able to transfer to white schools, and also to avoid assignment to Northeast and Sumner, the Negro junior high and high schools (R. 51).

The change in the feeder pattern from the Hawthorne School, requiring that students living east of 13th Street attend Northeast and Sumner, was accomplished without informing the parents involved—in fact, the change was denied even after the children from Hawthorne had been pre-enrolled at the Negro Northeast Junior High (R. 68-69; 78; 81; 85; 90). Witnesses for the board testified that the change in the boundary line was made to equalize pupil enrollment, but petitioners' Exhibits 29 and 21, which reflect class schedules for Northwest for the 1959-1960 and the 1960-1961 school years show no appreciable change in class size nor any class in excess of the optimum for effective teaching as stated by the superintendent of schools (R. 55; 60-63; 108). The board asserted that the change was made without knowledge of the number of white and Negro students to be affected, yet the superintendent testified that he recognized the fact that the majority of Negro families lived east of Thirteenth Street (R. 120; 122). The record makes clear that the line would not have been so drawn except for the racial composition of the neighborhood.[5]

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[5] See the testimony of the Superintendent of Schools, pps. 120-121:

> Q. When you drew the line for the Hawthorne area at Thirteenth Street, it was with recognition of the fact that the majority of Negro families lived east of Thirteenth Street, weren't you, in effect, requiring Negro children to go to the Northeast Junior High School?
>
> A. Yes, but that was not because of race. It was because of number.
>
> Q. Now, let me ask you this—because of number.

The segregation of school staffs in Kansas City is also not the result of coincidence. The total replacement of the white faculty of Hawthorne with Negroes after the student body became largely Negro, serves to illustrate that the acts of the board were predicated on racial and not educational considerations.

The board's transfer policy was finally invalidated by the district court because of the mandate in *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683, thus interdicting future transfers on racial grounds, although leaving uncorrected the damage done. The court of appeals, in a peculiar train of reasoning, found that because the use of such a transfer policy had not been declared unlawful by the courts in 1960, such use did not evidence any intent to segregate. Such an argument is akin to asserting that because prior to the decision in *Brown* v. *Board of Education*, segregation was valid, no school board had intended to segregate before 1954. Moreover, this Court, before

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Let us suppose, if you will, that in 1959 when that decision was made that you had determined that the majority of families who were in that area, that the majority of them were white that lived east of Thirteenth Street, would you have drawn the line at Thirteenth Street under those circumstances?

A. We had to reduce enrollment at Northwest Junior High School, the line would have been to reduce the enrollment.

Q. And you would have drawn that line in spite of the fact that you, the School Board and the community regarded Northeast Junior High School as a Negro school, and in spite of the fact that the School Board has a policy which we have agreed upon that they will not require white children to go to a school in which the preponderance of children are of another race, you would have drawn that line even under those circumstances?

A. That isn't—that policy isn't pursued entirely.

Q. If you will, Mr. Schlagle, answer the question, and then any explanation you have will be perfectly permissible to give, but I would like to have an answer to the question.

A. It would have to be yes and no.

Q. Yes and no?

A. Yes.

holding similar provisions unlawful because of their "purely racial character and purpose," noted the obvious reason for the institution of such policies:

> It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. Indeed, the provisions can work only toward that end. (*Goss, supra,* at 686.)

The court below, relying on the respondents professions of good faith, rejected this Court's analysis of the motivations of such transfer plans, and rejected as well all other indicia of intentional segregation.

The rationale that facts such as these should be judged on the basis of subjective good faith, or conjecture as to the state of mind of school authorities has been rejected by other circuit courts. In *Evans* v. *Ennis,* 281 F. 2d 385, 394 (3rd Cir. 1960), cert. denied, 364 U. S. 924, it was pointed out that even assuming that defendants had acted in good faith, ". . . good faith cannot solve their problem or our own. True, the defendants must act in good faith to comply with the mandate of the Supreme Court, but they must do more than this. They must proceed to integration with all deliberate speed."

Further precision as to the application of objective standards is provided in *Dove* v. *Parham,* 282 F. 2d 256, 261 (8th Cir. 1960):

> Both we and the trial court have regarded the board as having been acting with subjective good faith. The question here, however, is not state of mind but required action. Required action is measurable only by objectivity.

See in accord *Norwood* v. *Tucker,* 287 F. 2d 798, 804 (8th Cir. 1961); *Northcross* v. *Board of Education of Memphis,* 302 F. 2d 818 (6th Cir. 1962), cert. denied, 370 U. S. 944.

In the domain of these indispensable rights, a course of conduct must be judged not by self-serving declarations

on the part of officials, but by the consequences of such conduct. This is the *ratio decidendi* of *Goss* v. *Board of Education of Knoxville,* 373 U. S. 683; *Gomillion* v. *Lightfoot,* 364 U. S. 339; and *Brown* v. *Board of Education,* 349 U. S. 294.

This Court has never been hampered by the form of resistance against a constitutional duty. As was stated in *Watson* v. *Memphis,* 373 U. S. 526, 533:

> The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

The board in the instant case, by engaging in actions the inevitable consequence of which is racial segregation, has deprived petitioners of equal protection and due process of law. Cf. *Goss* v. *Board of Education, supra,* at page 689. Petitioners urge that this Court make its own evaluation of the evidence in order to provide guidance to the lower courts as to whether such conduct by a board of education indicates discriminatory intent and falls within the proscription of the Fourteenth Amendment. Cf. *Edwards* v. *South Carolina,* 372 U. S. 229, 235; *Blackburn* v. *Alabama,* 361 U. S. 199; *Spano* v. *New York,* 360 U. S. 315; *Napue* v. *Illinois,* 360 U. S. 264; *Muir* v. *Louisville Park Theatrical Association,* 102 F. Supp. 525 (W. D. Ky. 1951), aff'd, 202 F. 2d 275 (6th Cir. 1953), vacated and remanded, 344 U. S. 971; *Niemotko* v. *Maryland,* 340 U. S. 268, 271; *Feiner* v. *New York,* 340 U. S. 315, 316, 322, fn. 4; *Watts* v. *Indiana,* 338 U. S. 49, 50-51; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Baltimore & Ohio Railroad Company* v. *United States,* 298 U. S. 349, 372; *St. Joseph Stock Yards Company* v. *United States,* 298 U. S. 38, 49-55; *Norris* v. *Alabama,* 294 U. S. 587, 589,

590; *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287.

Such an evaluation will reveal to this Court that this case is not predicated on a so-called de facto school segregation theory, but rather is a case in which school authorities have sought to defeat and frustrate the promise of equal education held out to all children in *Brown*. And because this is precisely the issue posed, review by this Court is of critical importance to prevent here the successful use of stratagems to deny to Negro children in Kansas City, Kansas, the fruits of the holding in *Brown*.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

Opinion of the U. S. Court of Appeals for the Tenth Circuit, September 25, 1964

Before:

MURRAH, *Chief Judge,* PICKETT and HILL, *United States Circuit Judges.*

HILL, *Circuit Judge*:

This class action was brought below by a group of Negro children, through their parents and next friends, to enjoin the appellant Board of Education from continuing certain alleged discriminatory practices in the administration of the Kansas City, Kansas, school system. The relief sought was granted in part and denied in part. The appeal is from that portion of the decree denying the class relief as sought.

Because of the broad attack made upon the administration of the school system, it is necessary to detail the evidence adduced at the trial below.

The public schools operated by the Board of Education of Kansas City, Kansas, consist of elementary, junior high and high schools as well as a junior college. The entire school system was operated on a segregated basis for many years prior to 1951. The pupils and faculty of each school were all of one race. In 1951 the Board merged the two previously segregated junior colleges into one integrated junior college. The two junior colleges had been located in the same buildings as the segregated high schools and each of them had its own faculty which reflected the racial composition of the student body. The teachers taught in both the high school and the junior college. After the two junior colleges were merged into one junior college in a separate building, the faculty of the one integrated junior college became all white and the Negro teachers were re-

tained but became full-time teachers in the segregated high school.

During the period from 1951 to 1954, the Board operated four high schools, six junior high schools and thirty-eight elementary schools on a segregated basis. Three of the high schools—Rosedale, Argentine and Wyandotte—were white and one high school—Sumner—was Negro. As to the six junior high schools, Rosedale, Argentine, Central, West and Northwest were composed of white students and Northeast was Negro. Seven of the thirty-eight elementary schools were Negro: Douglass, Grant, Stowe, Dunbar, Kealing, Attucks and Lincoln. The remaining thirty-one elementary schools, including Hawthorne, were white. Throughout this period of time, no Negro children attended Hawthorne Elementary School or Northwest Junior High School and no white children attended Northeast Junior High School. Again, the faculties of all of the schools reflected the racial composition of the respective student bodies.

On August 2, 1954, and subsequent to the decision in Brown v. Board of Education, 347 U. S. 483 and 349 U. S. 294, the Board initiated a policy whereby the school system was to be integrated "as rapidly as classroom space can be provided" and it empowered the Superintendent of Schools to implement that policy. In his reports to the Board on November 21, 1955, May 7, 1956 and March 3, 1958, the Superintendent recited that integration of the school system was accomplished in four steps. First; the merging and integration of the Junior College at the opening of school on September 10, 1951, prior to the decision in Brown and the resulting declaration of policy. Second; the establishment of tentative boundary lines between formerly Negro and formerly white segregated schools based upon geographic lines, and not race, which resulted in the integration of all kindergarten students, of all first grade students with the exception of those attending two named schools, where

studies indicated that housing might not be available, of all 7th grade students in all of the junior high schools and of all 3 grades in all of the high schools. In addition, all of the grades in one elementary school were integrated. Students were permitted to attend the school located in the district in which they were a resident or had previously attended before the change in boundary lines so as to avoid unnecessary and undesirable psychological effects upon them. According to the November 21, 1955, report, this second step resulted in 232 Negro children attending schools which were formerly all white and, of this number 165 students were in the elementary schools and 67 students were in the junior high and high schools. It also resulted in the attendance of Negro children at 16 of the 30 elementary schools that were formerly all white and in all 5 of the junior high and high schools that were formerly all white. These results were accomplished by the opening of school in September, 1954. Third; by the opening of school in September, 1955, all of the elementary grades were integrated in all of the elementary schools except one, where housing was inadequate, and all of the grades of all of the junior high schools were integrated. The total number of elementary schools having no Negro students dropped from 14 to 11, even though 2 new schools were opened in areas having no Negro residents, and the number of Negro students attending formerly white schools in the elementary and secondary grades increased from 232 to 619. The number of Negro students from kindergarten through Junior College attending formerly white segregated schools increased from 302 in September, 1954, to 703 in September, 1955, and one white student attended the formerly all Negro high school, Sumner. It was noted that, as integration proceeded, further adjustments in the boundary lines of the schools would be almost inevitable because of housing accommodations. Fourth; by the opening of school in September, 1956, the school district boundary lines

were defined, all students were required to attend the school of the district in which they resided, unless granted a permit to attend elsewhere, and permits were issued to students who desired to continue attendance at Sumner High School, regardless of where they resided. In addition, the greater part of the bus transportation was discontinued.

The school system operates on what is known as the "neighborhood school policy" and the "feeder school policy". Under the neighborhood school policy, boundary lines for a school attendance district are established as nearly as possible in the area surrounding the school and it takes into consideration such factors as school capacity, number of students, natural barriers, such as rivers and railroad lines, and the possibility of increase or decrease in population. Any student living within the boundaries of that school district may attend the school as a matter of right and ordinarily is required to do so. The feeder school policy means that all of the students who graduate from a given elementary school must attend the same designated junior high school and all of the students who graduate from a given junior high school must attend the same designated senior high school.

The junior high schools involved in this litigation are West, Northwest and Northeast. They are located on an east-west line in the north part of the city. The Hawthorne Elementary School is directly involved in this litigation. Its boundary lines were established by the Board on August 5, 1957, for the school year of 1957-1958 and were to remain in effect until changed. Prior to 1960, Hawthorne was a predominantly white school and was staffed by white personnel. Under the "feeder" system students graduating from Hawthorne were required to attend Northwest Junior High School and, thereafter, Wyandotte High School, both of which were and are predominantly white schools.

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In about 1956, the city commenced two slum clearance projects covering areas in which almost all of the residents were Negroes. Consequently, under the neighborhood school policy most of the elementary schools located in those areas were attended by Negro children and under the feeder school policy most of these students were required to attend Northeast Junior High School upon graduation from elementary school. As a result of the two projects, large numbers of Negro families were forced to move and many of them purchased homes in the attendance district of Hawthorne Elementary School, mainly between 9th and 13th Streets. Thus, by 1960 a majority of those residing in the Hawthorne district were Negroes, with the heaviest concentration being east of 13th Street. In September, 1960, only 4 Negroes families lived west of 13th Street but by January, 1962, that number had increased to 50 or 55 families. Accordingly, at the time of trial in 1962, Hawthorne had changed from a so-called white school to a predominantly Negro school and the faculty became all Negro rather than white.

The Superintendent of Schools testified that, as a result of the shift in population caused by the two projects, studies and surveys were made in September, 1959, of the Northwest, Northeast and Hawthorne areas and it appeared that there was a possibility that Northwest Junior High School would become overloaded and overcrowded and half-day sessions might be required in that school. It was also anticipated that there would be vacant classrooms at Northeast Junior High School. The Superintendent further testified that changes were made in the attendance boundary lines for Northwest and Northeast in order "to equalize the student load in the two buildings." The minutes of the Board meeting of August 22, 1960, show that the attendance district of Hawthorne Elementary School was divided and the students graduating from that school who resided east of 13th Street, which includes the appellants,

were assigned to Northeast Junior High School. Prior to that time, all students graduating from Hawthorne were, under the feeder system, assigned to Northwest. It is this change in the Hawthorne attendance district, which required the appellant children to attend Northeast rather than Northwest, that gave rise to this litigation.

The record shows that the student seating capacity at Northwest Junior High School in the school year of 1960-1961 was 1,367 and at Northeast it was 1,217. The student enrollment at Northwest during the school year of 1959-1960, prior to the changes in boundary lines, was 1,129 and at Northeast it was 923. After the change in boundary lines and during the school year of 1960-1961, the student enrollment was 1,176 at Northwest and 1,006 at Northeast. Both of these figures are below the student capacity of the respective schools but the Superintendent testified that "• • • educationally, you cannot put in more than about 85 to 87 percent of the total seating capacity in a building and enroll them, because not all subjects are enrolled in equally, so, when you reach within 13 to 15 percent of the maximum seating capacity of a building, you are destroying the educational opportunities." Had the boundary line not been changed, the enrollment would have been 1,250 at Northwest and 932 at Northeast.

At the same Board meeting in which the boundary line changes were made, the Board adopted a policy of granting permits for students from the Hawthorne District east of 13th Street, who had attended Northwest the previous year, to continue at that school. It also specifically adopted a policy, which had been in effect prior to that time, of granting permits to students enabling them to transfer from a school "where the majority of the students are of a different race", when the students requested such a transfer.

The evidence indicates that the division of the Hawthorne district whereby the students residing east of 13th

Street were required to attend Northeast rather than Northwest, was not publicized to any great extent and that the appellants experienced some difficulty in ascertaining the basis for the change. The appellant parents met on different occasions with the Assistant Superintendent of Schools, the Board and the Superintendent. They were ultimately advised of the change in boundary lines and the children were all denied enrollment at Northwest Junior High School for the school years of 1960-1961 and 1961-1962. Testimony was also presented on behalf of appellants to the effect that for the school years of 1960-1961 and 1961-1962 some of the children in the same family were required to attend Northeast while some of them were attending Northwest and that the distance from their homes to Northeast was appreciably greater than the distance to Northwest.

It should be pointed out, however, that the appellees presented evidence to the effect that under the Board's rules the maximum distance a student could live from a school and still attend that school was about 1.5 miles and this is the generally accepted maximum distance. Evidence was also presented to the effect that while school boundary lines, prior to 1954, were drawn on the basis of race, such lines were thereafter established upon the basis of geography, *i.e.*, school capacity and number of children living within a prescribed area surrounding a school, and that the change in boundary line on August 22, 1960, was made without knowledge of the number of white and Negro students to be affected and without race in mind.

The record discloses that, as of the time of trial below, the student bodies of Attucks, Douglass, Dunbar, Grant, Kealing and Stowe Elementary Schools were all, or predominantly, Negro children and that while Lincoln Elementary School had been discontinued, Hawthorne Elementary School had become a predominantly Negro school. Northeast Junior High School and Sumner High School

were, at that time, virtually 100 percent Negro and all of these schools were staffed by Negro personnel. The record also discloses that, as of April 13, 1962, the racial composition of the student bodies at the Junior College and the remaining junior and senior high schools was as set forth in the margin.[1] As of the same date, only 11 of the elementary schools had an all white student body and out of a total enrollment of 7,257 in the remaining 20 elementary schools, there were 1,360 Negro children in attendance.

The trial court resolved the controversy over the pupil transfer policy in favor of the plaintiffs-appellants and held it to be unconstitutional. No appeal was taken from that part of the decree. But, with that exception, the lower court approved the overall policy of the Board and, in denying the injunction, found and held that: In relocating the boundary in the Hawthorne district for the purpose of establishing the boundaries of the Northwest and Northeast Junior High Schools, the Board "acted in good faith and for the purpose of balancing the enrollment of the two schools involved"; relocation of attendance district boundaries for the Kansas City public schools was made "on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate"; each child would attend the school within the district of his residence, without regard to race; and the overall policy of the Board met "the tests set forth in Brown v. Board of Education, 349 U. S.

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[1]

School	*White*	*Negro*
Junior College	465	94
Argentine	997	124
Rosedale	912	134
Wyandotte	1749	117
Central Junior High	990	67
Northwest Junior High	878	239
West Junior High	601	21

294, and, with the exception of the transfer policy herein referred to, has served to effectuate a racially nondiscriminatory school system." It is from this portion of the decree that this appeal was taken.

Appellants contend here, as they did in the court below, that the Board's policy evinces a clear pattern of the deliberate use of zone lines and assignment regulations to insure the continued operation of a segregated school system. To support this contention, they point out the following factors: The fact that seven of the elementary schools are still composed of predominantly Negro students and eleven are composed of all white students; the Northeast Junior High and the Sumner High Schools are still virtually 100 percent Negro; the boundary lines for Northwest and Northeast Junior High Schools were so changed in the Hawthorne district as to require the majority of the Negro children residing in that district to attend the Negro schools of Northeast and, thereafter, Sumner; the fact that Negro schools are staffed by Negro personnel and white schools with only white personnel; and the transfer system whereby children were permitted to transfer out of their normal school district when the majority of the students in that school were of a different race. The appellants also attempted to demonstrate by use of the 1962 census figures that a great majority of Negro students still attend Negro schools but that is not helpful because those figures are confined to the number of children residing in the City of Kansas City and the boundary lines for the Board of Education are not identical with the city boundary lines.

The starting point in any school segregation case is the basic principle that state-imposed racial segregation in the public schools is unconstitutional and prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Goss v. Board of Education, 373 U. S. 683; Cooper v. Aaron, 358 U. S. 1; Brown v. Board of Education, supra. The right of a stu-

dent not to be discriminated against or segregated on racial grounds in the public schools is so fundamental that it is embraced in the concept of due process of law under the Fifth Amendment. Cooper v. Aaron, supra; Bolling v. Sharpe, 347 U. S. 497. This principle is the supreme law of the land, Cooper v. Aaron, supra, and all provisions of federal, state and local law requiring or permitting such segregation or discrimination must yield to it, Brown v. Board of Education, supra, 349 U. S. at 298. The burden of initiating desegregation in the public schools rests upon the school authorities, who have the primary responsibility for assessing and solving the varied local school problems arising as a result of implementing the decision in Brown, supra, and the courts must determine whether the action of the school authorities constitutes good faith implementation of those constitutional rights. Cooper v. Aaron, supra; Brown v. Board of Education, supra, 349 U. S. at 299. There cannot be full compliance with these constitutional requirements until all dual school systems based upon race or color have been eliminated. Ross v. Dyer, 5 Cir., 312 F. 2d 191; Augustus v. Board of Public Instruction, 5 Cir., 306 F. 2d 862.

The Supreme Court in Cooper v. Aaron, supra, held that the Fourteenth Amendment prohibitions against racial discrimination in the public schools " * * * extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action * * * or whatever the guise in which it is taken * * * " and that the constitutional right of a student not to be discriminated against in the public schools on grounds of race or color " * * * can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously' * * * " (358 U. S. at 17). Thus, it has been held that a transfer plan or policy, such as the one adopted by the

Board in this case, whereby a student might transfer out of a desegregated school if a majority of the students in that school are of a different race than the student seeking such transfer, is invalid. Goss v. Board of Education, 373 U. S. 683; Mapp v. Board of Education of City of Chattanooga, 6 Cir., 319 F. 2d 571; Brooks v. County School Board of Arlington County, Virginia, 4 Cir., 324 F. 2d 303. The application of such criteria as overcrowding in the school rooms to one race and not to another so as to bar the assignment of certain students to a particular school is prohibited, March v. County School Board of Roanoke County, Virginia, 4 Cir., 305 F. 2d 94, as is the intentional gerrymandering of school attendance district lines so as to confine one race to attendance at a particular school, Taylor v. Board of Education of City School District of New Rochelle, 2 Cir., 294 F. 2d 36, cert. denied, 368 U. S. 940. Finally, the maintenance of a discriminatory "feeder" system, whereby pupils assigned initially to a Negro school were routinely promoted to Negro schools and, in order to transfer to white schools, they were required to meet criteria to which white students of the same scholastic aptitude would not be subjected, does not comport with constitutional principles. Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F. 2d 429.

The neighborhood school system and other school systems, by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. They have been successfully challenged on constitutional grounds where operated in such a way as to discriminate against students because of their race or color. E.g., Norwood v. Tucker, 8 Cir., 287 F. 2d 798; Northcross v. Board of Education of City of Memphis, 6 Cir., 302 F. 2d 818, cert. denied, 370 U. S. 944; Green v. School Board of City of Roanoke, Virginia, 4 Cir., 304 F. 2d 118; Dodson v. School Board of City of Charlottesville, 4 Cir., 289 F. 2d 439; Jones v. School

Board of City of Alexandria, Virginia, 4 Cir., 278 F. 2d 72. On the other hand, these same cases recognize the principle that in the absence of a showing that such school systems are being used to deprive a student of his constitutional rights, they are not objectionable on constitutional grounds.[2] In the second Brown case, supra, the Supreme Court appears to have recognized that school admissions may be based upon such factors as residence. It said that in determining "good faith compliance at the earliest practicable date", the lower courts might take into account problems arising from the " * * * revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis * * * " (349 U. S. at 300 and 301). The Sixth Circuit has said: "Minimal requirements for nonracial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right * * * ". Northcross v. Board of Education of City of Memphis, supra, 302 F. 2d at 823.

There is, to be sure, a racial imbalance in the public schools of Kansas City. The record shows that, as of April 13, 1962, there was a total of 7,467 Negro children in the elementary, junior high and senior high schools. Almost 73 percent of these children, or 5,405, attended the nine schools which were predominantly Negro. The remaining 27 percent, or 2,062 children, attended 26 integrated schools. Of course, the schools located the nearest to the concentration of Negro population had the highest precentage of Negro pupils and the schools the greatest distance away from that concentration were composed entirely of white students. Thus, while there were some schools having an all Negro student body and some having an all white

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[2] See also Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N. D. Ala. 1958), aff'd, 358 U. S. 101.

student body, there were also 26 of the Kansas City schools that had both Negro and white students. Appellants' assertion that the racial composition of Wyandotte High School and Northwest Junior High School "is consistent with their pre-1954 character" has no support in the evidence which shows that these schools were all white prior to 1954 and, after 1954, there were 117 Negro students in attendance at Wyandotte and 239 at Northwest. The evidence clearly shows that at least some Negro students were in attendance at each and every one of the junior high and senior high schools in the Kansas City school system. And, the Superintendent of Schools testified that the school attendance districts were laid out without regard to race and upon the basis of geography, school capacity and number of children residing in the district. There is therefore no basis in fact for the appellants' contention that the evidence establishes "a clear pattern of deliberate use of zone lines and assignment regulations to insure the continued operation of a dual school system." All of the evidence is to the contrary and the trial court so found saying that the boundary lines after 1954 "were set on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate."

It is true that the boundary line in the Hawthorne Elementary School district was changed so as to require the attendance at Northeast Junior High School of all students residing east of 13th Street and that the effect of such change was to require many Negro children, including appellants, to attend the predominantly Negro junior high school, Northeast, rather than Northwest, an integrated school. Of course, we agree with the appellants that the school authorities cannot, under applicable constitational standards heretofore discussed, use such a change in boundary lines or the neighborhood school system as a guise for the purpose of perpetuating racial segregation.

The trouble is that there is no evidence to show that the boundary line was changed for that purpose. Rather, the trial court, after hearing and observing the witnesses, found that the school authorities "acted in good faith and for the purpose of balancing the enrollment of the two schools involved." That finding is supported by the evidence which shows that, as a result of slum clearance projects, there was a general shift in the city's population in a westerly direction. This brought about the relocation of many Negro families to the Hawthorne area. The Superintendent of Schools testified that the change in boundary line was directly attributable to this shift in population and was made without knowledge of the number of white and Negro children to be affected and without race in mind. He also testified that it was made to alleviate overcrowded conditions at Northwest, which was in danger of having to go on half-day sessions. In addition, the record discloses that in 1956 Parker Elementary School district was divided so as to change some students to West Junior High School from Northwest and as the trial court said: "* * * There is no more reason to believe that the division of Hawthorne district in 1960 was based on any other considerations than those which prompted the division of Parker district in 1956, i.e., to achieve an adjustment of the pupil load between junior high school districts. * * *" The drawing of school zone lines is a discretionary function of a school board and will be reviewed only to determine whether the school board acted arbitrarily. Northcross v. Board of Education of City of Memphis, 6 Cir., 333 F. 2d 661. There is no showing that the Board acted arbitrarily in this case.

It is also true that the staffs of the various schools are either all white, as is the case in white and integrated schools, or all Negro. But, the appellants do not, by their complaint or evidence, seek to have these staffs desegre-

gated. Furthermore, they have not cited and we have not found any case holding that such a policy, in and of itself, is sufficient to establish a discriminatory intent on the part of the Board.

The pupil transfer policy adopted by the Board was held by the lower court to be violative of the Fourteenth Amendment and therefore invalid under the rule announced in Goss v. Board of Education, supra. While no appeal from this ruling was taken, the existence of that policy is relied upon by appellants as indicative of the overall intent of the Board. But, it must be remembered that during the entire period it was in effect, identical systems had been held to be legal and proper when applied equally to Negro and white students, as is the situation in this case. Goss v. Board of Education of City of Knoxville, 6 Cir., 301 F. 2d 164, reversed 373 U. S. 683; Kelley v. Board of Education of City of Nashville, 6 Cir., 270 F. 2d 209, cert. denied, 361 U.S. 924; Dodson v. School Board of City of Charlottesville, 4 Cir., 289 F. 2d 439. The use of such a policy therefore has no bearing upon the Board's intent.

It follows from what has been said that none of the factors relied upon by appellants, when considered alone, is sufficient to establish a denial of their constitutional right not to be discriminated against because of race or color. The crucial question, however, is whether all of these factors considered together are sufficient. In this connection the trial court made a negative finding to the effect that there was no evidence to show that the appellees were not carrying out the integration policy set forth in the Superintendent's reports of November 21, 1955, May 7, 1956, and March 3, 1958. The court also found and held that "* * * the overall policy of the Board of Education of Kansas City, Kansas meets the tests set forth in Brown v. Board of Education, 349 U. S. 294, and, with the exception of the transfer policy herein referred to, has served to effectuate a racially non-discriminatory school system."

The question is one of fact and, dealing as it does with the good faith intentions of the school authorities, it is peculiarly in the province of the trial judge who ha the opportunity to hear and observe the witnesses. Under these circumstances, we should be, and are, most reluctant to overturn his findings and conclusions unless convinced that they are clearly erroneous. We are not so convinced on this record. Certainly, there is no evidence of intentional gerrymandering of the school attendance districts, of the use of a dual school system, of the assignment of pupils according to racial factors or of any of the other "schemes" and "devices" condemned in the cases discussed above. In our opinion, the Kansas City school system meets the "minimal requirements for nonracial schools" of "geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right."

Appellants also contend that even though the Board may not be pursuing a policy of intential segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention,[3] the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school

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[3] See Evans v. Ennis, 3 Cir., 281 F. 2d 385, 389, cert. denied, 364 U. S. 802; Taylor v. Board of Education of City School District, 191 F. Supp. 181 and 195 F. Supp. 231, aff'd, 294 F. 2d 36, cert. denied, 368 U. S. 940; Blocker v. Board of Education of Manhasset, New York, 226 F. Supp. 208 (E. D. N. Y. 1964); Branche v. Board of Education of Town of Hempstead, 204 F. Supp. 150 (E. D. N. Y. 1962); Jackson v. Pasadena City School District, 59 Cal. 2d 876, 382 P. 2d 878.

with them. Kelley v. Board of Education of City of Nashville, supra; Stell v. Savannah-Chatham County Board of Education, 5 Cir., 333 F. 2d 55; Evers v. Jackson Municipal Separate School District, 5 Cir., 328 F. 2d 408; Boson v. Rippy, 5 Cir., 285 F. 2d 43; Holland v. Board of Public Instruction, 5 Cir., 258 F. 2d 730; Avery v. Wichita Falls Independent School District, 5 Cir., 241 F. 2d 230, cert. denied, 353 U. S. 938; Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F. 2d 429; Jeffers v. Whitley, 4 Cir., 309 F. 2d 621.[4]

Moreover, the question was conclusively answered in Bell v. School City of Gary, Indiana, 7 Cir. 324 F. 2d 209, 213, cert. denied, — U. S. —, where the court held that "* * * there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils."

We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation.

The judgment is Affirmed.

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[4] In Brown v. Board of Education, 139 F. Supp. 468, 470 (D. Kan. 1955) the three-judge court, after remand from the Supreme Court, said:

"* * * Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."